No. 14,743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

OPENING BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of contempt of Congress (2 U.S.C. Sec. 192). The cause was tried before a jury and Honorable George H. Boldt, Judge. Appellant was found guilty on five counts and was meted a sentence of 10 months in jail and a fine of $250.00.

Jurisdiction of this Court to review the judgment of conviction is conferred by 28 U.S.C., Sec. 1291 and Rule 37 (a) of the Federal Rules of Criminal Procedure.

STATUTE INVOLVED

The pertinent statute involved, 2 U.S.C., Sec. 192, provides as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes a default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

STATEMENT OF THE CASE

Amongst the subpoenas issued by the House Committee on Un-American Activities for appearance of witnesses to testify at a televised hearing before that Committee in the U.S. Court House at Portland, Oregon, was a subpoena issued and served upon Herbert Simpson, appellant herein. He appeared as directed on June 18, 1954, but he was not called to testify until June 19, 1954. The members of the subcommittee present on the day in question were Representatives Harold H. Velde, chairman, and James B. Frazier. Robert L. Kunzig, the chief witness for the prosecution, acted as counsel for the subcommittee.

Many questions were put to appellant inquiring of Communist membership and activity by him. In refusing

to answer most of the questions he evoked the Fifth Amendment to the U.S. Constitution as well as other amendments. On December 1, 1954, the following indictment for contempt was issued against appellant:

"THE GRAND JURY CHARGES:

Introduction

That on or about June 19, 1954, at Portland, in the State and District of Oregon, a duly authorized subcommittee of the Committee on Un-American Activities of the House of Representatives of the Congress of the United States of America was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and to H. Res. 5, 83d Congress.

That the defendant, HERBERT SIMPSON, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. At the place and time stated, the defendant, Herbert Simpson, refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into each of the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant, Herbert Simpson, and which he, the said Herbert Simpson, refused to answer, all in violation of Title 2, U.S.C., Sec. 192.

COUNT I

Mr. Simpson, would you please state your residence?

COUNT II

Isn't it a fact that you live at 9115 North Geneva, Portland, Oregon?

COUNT III

Where are you presently employed, Mr. Simpson?

COUNT IV

Would you give this Committee, please, a brief resume of your educational background?

COUNT V

Now, Mr. Simpson, did you ever go to high school?

COUNT VI

Were you ever in the Armed Forces of the United States?

Dated at Portland, Oregon, this 30th day of November, 1954

A TRUE BILL.

/s/ Mabel W. Windnagle
Foreman, United States Grand Jury

BAIL $750.00
C. E. LUCKEY
United States Attorney
for the District of Oregon
/s/ C. E. Luckey
Endorsed:
Filed December 1, 1954
F. L. Buck, Acting Clerk
by V. O. Bishop, Deputy."

A motion to dismiss the indictment was filed on behalf of appellant on December 27, 1954 (Tr. of Rec. 12). This motion was supported by affidavit of the appellant as well as a brief, and a brief in opposition to the motion was filed by the prosecution on December 27, 1954 (Tr. of Rec. 23). On December 29, 1954, appellant filed a motion for a subpoena duces tecum to require the chief investigator of the Un-American Activities Committee or other representative of the Committee to appear at the trial and produce reports, documents and papers in the Committee's possession and that the same be made avail-

able for the inspection of counsel for appellant before trial (Tr. of Rec. 31). The Court did not rule upon that motion and on January 13, 1955, appellant filed a new motion for subpoena duces tecum and for inspection, and also moved that in the event that the prosecution failed to produce the said witnesses and documents, the appeal be dismissed and further, that in the event that the Court failed to dismiss the indictment pursuant to motion previously filed, the cause be postponed until such time as the witnesses and documents sought are produced and made available in Court. This motion was made to supplement the previous motion and was supported by detailed affidavits (Tr. of Rec. 33-37).

On January 20, 1955, the day of trial, the Court denied the motion, the case was tried before a jury and after the Court dismissed count III, the jury returned a verdict of guilty on the other five counts. On January 25, 1955, appellant filed a motion for new trial and for an extension of time to amplify, amend and supplement that motion and appellant also moved that he be permitted to submit further testimony on the issues that the Court had confined to itself without the intervention of the jury (Tr. of Rec. 39-41). These motions were denied on January, 31, 1955, and on the same date appellant was sentenced to ten months in jail and a fine of $250.00. The Trial Court admitted appellant to bail (Tr. of Rec. 42).

The Transcript of Proceedings is typewritten and consists of three parts. The pages of the first part are numbered from 1 to 9. Immediately following is the second part with two pages of indexes and pages num-

bered from 1 to 135, which includes the proceedings and the testimony of the day of trial, January 20, 1955. The third part contains the proceedings after the trial and consists of pages 1 to 72 and follows immediately after page 135 of the second part. The Transcript of Record is also typewritten and is separately bound and consists of consecutively numbered pages from 1 to 56.

SPECIFICATION OF ERROR No. 1

The Court erred in denying appellant's motion for a subpoena to subpoena three witnesses at government expense and a motion for subpoena duces tecum and a motion for inspection.

ARGUMENT

Appellant filed a motion under Rule 17 of Federal Rules of Criminal Procedure for subpoena duces tecum and for inspection of documents, etc., in possession of the Committee, on December 29, 1954 (Tr. of Rec. 31). Before this motion was acted upon, appellant filed an additional or supplemental motion on January 13, 1955 (Tr. of Rec. 33). The latter motion also asked for a dismissal of the case or for a postponement of it in the event that the Government failed or refused to comply with the motion. No action was taken on these motions until the date set for the trial, i.e. January 19, 1955, at which time the Court stated (Tr. of Proc. 9), "In the Wollam case the motion is denied and in the others a final ruling will be held in abeyance." On January 20, 1955, after the jury was empanelled, the Court stated (Tr. of Proc. 3),

". . . I feel that the showing made is wholly inadequate to justify the issuance of the subpoena or to permit the inspection."

The salient portions of Rule 17 are as follows:

"Rule 17. Subpoena

(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Appellant's motion is clear and specific and sets forth that appellant does not have the means of paying the witness which he needed for his defense and it specifically names the witnesses and gives their addresses. It names a specific document, a summary used by Robert L. Kunzig when he interrogated appellant at the subcommittee hearing. It also asks for other papers and documents in the possession of the Committee. The previous existence of the summary mentioned was verified by two items of evidence, one is by witness Tom Griffin, appearing on pages 94 and 95 of the Transcript of Proceedings. The other will be observed in a picture showing Mr. Kunzig and taken at the time appellant was being interrogated by Mr. Kunzig and is amongst exhibits 9 to 12. The Court will note that in that picture Robert L. Kunzig, the interrogator, has right before him a typewritten summary.

The motion is supported by an affivadit of appellant in which he sets forth his indigent status, the names of the witnesses and their addresses and in it he further states that the witnesses to be subpoenaed have gathered and had information and that the Committee itself had evidence in its files that would show that appellant had good grounds under the Fifth Amendment to refuse to answer the questions propounded. It will be seen by examining the motion and affidavit from pages 35 through 37 of the Transcript of Record that appellant met all of the requirements that would justify the issuance of the subpoena and the requirement of the production of the documents for inspection and that the Trial Court abused its dis-

cretion in denying appellant's motion. It must further be borne in mind that there was no denial of the facts as set forth in the affidavit and that such facts must, therefore, be taken as true.

SPECIFICATION OF ERROR No. 2

The Court erred in denying appellant's motion for a continuance and postponement of the trial to a later date.

ARGUMENT

It was not until the day of trial and until the jury was empanelled that the Court ruled on appellant's motion for a subpoena duces tecum and for inspection (Tr. of Proc. 2-3). Likewise, although the Court was advised by appellant's counsel that appellant wished to move for a postponement of the trial in the event that the other motion was denied, the Court nevertheless empanelled and had the jury sworn in before it gave counsel an opportunity to make the motion for postponement of the trial. This was an abuse of discretion under the circumstances. The indigence of appellant was an undisputed fact in the record. One of the issues in the case was the pertinence of the questions asked on which the indictment was issued. Another issue was whether the privilege under the Fifth Amendment was rightly exercised by appellant. It is the firm belief of appellant that the documents that appellant sought to subpoena and inspect would have furnished conclusive evidence on behalf of appellant on both of these issues. For want of them appellant needed time and opportunity to obtain other evidence on these issues. This

could not be done after the jury was empanelled and before the jury was instructed, all on the same day.

Later events in the trial proved how right appellant was. The Court permitted Robert L. Kunzig to testify what the Committee was authorized to do and what the purpose of the sub-committee was in coming to Portland and asking the questions that it did. Although in appellant's view the questions were improper, appellant's objections were overruled and an answer given (Tr. of Proc. 15-25).

Appellant could have produced substantive expert testimony to disprove a great deal of the oral testimony of Mr. Kunzig. But for this appellant needed at least time if not money. If such expert testimony was properly admissible, appellant did have available, if time were given, the testimony of a writer, scholar, and college teacher who made a comprehensive study of the Committee and its purposes and whose testimony would have directly controverted Mr. Kunzig's.

Nowhere in the record either before or after the retirement of the jury did the Court designate a time for the presentation of testimony on the issues of pertinence or privilege, which issues the Court had reserved for itself.

A timely motion for continuance was made not only as a part of the motion for subpoena duces tecum on January 13, 1955, and again on the day of trial as soon as the Court permitted counsel to make the motion, but appellant's counsel again made the motion after appellee rested its case and appellant's motion to acquit was denied. It appears on page 107 of part 2 of Transcript of Pro-

ceedings and states as follows: "I move that this case be continued and postponed on the grounds that there are other necessary witnesses which I must get. Because of the developments that have occurred beyond my control, and particularly with reference to the ruling that was made on the motion the day before trial, and because of the development of testimony in a manner that I could not foresee, there are other witnesses whom I need and cannot obtain and will obtain on behalf of the defendant in this case. But I cannot present them this afternoon."

Again, at the time of presentation of arguments on appellant's motion for new trial, appellant asked for an opportunity to present further testimony on the issues of pertinence and privilege, which issues the Court had reserved for itself and determined as a matter of law (Tr. of Proc. Part 3, 39, 40).

The motion to postpone in this case was well taken and it was an abuse of discretion for the Court to have denied it.

SPECIFICATION OF ERROR No. 3

The Court erred in permitting the trial to continue before the jury empanelled.

ARGUMENT

On January 19, 1955, in the same Courtroom and before the same Court a panel of jurors was present and from it a jury was sworn to try the case against Donald Wollam, one similar in most respects to that of appellant. Donald Wollam was convicted by the 12 jurors selected

from that panel. The same panel appeared on the morning of January 20, 1955, when the Court required appellant to proceed with his trial, and the panel included all of the jurors who had sat on the Wollam case. In objecting to that particular jury, counsel for appellant stated:

> "I might say that there is an additional ground, and that is this: I desire to have answers to some specific questions. I do not believe that this jury can fairly try a second or a third case of the same nature or kind. I don't believe that - - -"

The Court interrupted as follows:

> "The Court: I can't hear you at any length, Mr. Lenske, on that. It is contrary to the long-standing Federal practice. Cases are tried as they come before the Court, and if it happens that the same jurors are called in successive cases of the same nature, we would never get anywhere with litigation if we were going to call in a whole new jury panel every time we had a new case. That is wholly impractical and, in my judgment, a visionary way to regard the matter. I can't hear you at any great length about that. You have your point and you have made it. I don't agree with it."

At least three of the jurors who sat on appellant's case were also jurors who returned a verdict of guilty in the Wollam case. As in appellant's case, the principal witness for the Government was Robert L. Kunzig. The theory of the law, and it is a logical one, is that where there are such successive similar cases, where the principal witnesses are the same, the jurors have formed an opinion relating to the verity of such witnesses which is prejudicial to the following cases. Thus it is stated in 160 A.L.R. on page 769 of the annotation commencing on 753 as follows:

"In other cases it has been held that a defendant in a criminal proceeding does not receive a fair and impartial trial where it appears that some of the members of the jury at his trial previously served on the jury at the trial of another defendant charged with a similar but independent offense, and witnesses who testified for the prosecution at the first trial were also used to establish the guilt of the defendant at the second trial. Some courts have reasoned further that, the credibility of such witnesses at the first trial having been sustained, particularly where the main defensive matter is the incredibility of such witnesses, an avowal of impartiality by the jurors will not remove their disqualification. It has been pointed out in this connection that it is impossible to determine by an investigation whether jurors have formed conclusions in the first case which disqualify them from sitting in the second, without opening the door to inquiries which will disclose the precise grounds upon which they reached the conclusion of guilt in the prior case."

The same question is covered in section 162 of 31 Am. Jur. where it is said on page 676:

"Jurors who have acted in a case involving an essential question of fact have been held incompetent to sit in a subsequent case where such question of fact is one of the material issues; this is on the ground that the juror is biased in that he has formed or expressed an opinion, and in some cases the rule has been adhered to even though the juror declared on his voir dire that he was unbiased."

SPECIFICATION OF ERROR No. 4

The verdict is contrary to the weight of the evidence.

To avoid being prolix and repetitive argument on this point and the one that follows will be treated in the summary.

SPECIFICATION OF ERROR No. 5

The verdict is not supported by substantial evidence.

ARGUMENT

As stated in the argument under other specifications herein, there is no substantial evidence on many essential points that could support a verdict and a judgment of guilt. There is one additional point, however, not otherwise covered, and that is that over the objection of the appellant, essential elements necessary for the prosecution's case were supported only by hearsay and incompetent testimony. Thus proof of the amended rules of the Committee and other integral parts of the prosecution's case are not made out by the authenticated published records of the Committee or sub-Committee, but by the oral testimony of Mr. Kunzig. Illustrating,

> "(By Mr. Carney) Q. Does the rule that you referred to require any particular number of persons to be on the subcommittee?
>
> Mr. Lenske: That is objected to as not the best evidence, your Honor.
>
> The Court: Overruled.
>
> A. Yes, sir. I personally was present when the rule was slightly amended and voted upon unanimously by the Committee to say that the Chairman would appoint subcommittees of three members of Congress, at least two of which had to be present. And at the hearings here in Portland there was a subcommittee of three appointed, of which two were present at all times."

The Best Evidence Rule was not followed and the verdict and judgment should have been set aside for this reason alone as well as the others herein specified.

SPECIFICATION OF ERROR No. 6

The Court erred in sustaining objections to questions addressed to the witness Robert L. Kunzig.

ARGUMENT

On pages 71 and 72 of part 2 of the Transcript of Proceedings appear the following cross-examination by appellant's counsel:

> "Q. Mr. Kunzig, the Court having permitted you to be qualified as an expert on this matter, can you testify what the effect has been on the jobs of persons who have been called before the Committee to testify in so far as their retention of their jobs after they have been called to testify?
>
> Mr. Luckey: If the Court please, I object to the question as being irrelevant.
>
> The Court: Objection sustained.
>
> Mr. Lenske: Q. Do you know of your own knowledge that in the majority of instances the persons called before the Velde Committee have as a result of so being called lost their employment?
>
> Mr. Luckey: If the Court please, the same objection.
>
> The Court: The same ruling. Sustained.
>
> Mr. Lenske: May I make an offer of proof on that?
>
> The Court: At some later time you may."

Clearly it was erroneous for the Court to prevent appellant from showing through the Committee's own expert that the prime purpose and effect of the Committee's interrogations was to cause the witnesses who were under suspicion of Communism, to lose their jobs. The record shows that appellant is one of those who did lose

his job promptly after appearing before the Velde Committee (Tr. of Rec. 14, 15).

On page 74 of part 2 of the Transcript of Proceedings appears the following cross-examination:

> "Q. Now after this subpoena was served upon Mr. Simpson was there any reasonable doubt in your mind or the mind of the Committee where Herbert Simpson worked?
>
> Mr. Luckey: If the Court please, I object to the question.
>
> The Court: Objection sustained."

This ruling was consistent with the Court's position that even though the Committee knew the answers to the questions, it still had the right to force those answers out of the mouth of appellant. Since the Court's premise was wrong its ruling amounted to prejudicial error.

On the same page of the Transcript of Proceedings we find the following (74, 75):

> "The Court: I think, Mr. Lenske, that I might just as well settle this matter once and for all. The Congress is not obliged, as I see the law, to seek its information in a manner that the witness might like, but may seek it from any source it chooses and to verify it in any manner it may see fit. Now the burden of your examination on this subject, as well as the previous one, was simply to the effect that there were other ways in which the Committee might have gotten the same information. Personally, I regard that as entirely immaterial. The Congress is not to be limited in its powers by what an individual witness might prefer in the matter of their inquiry. Accordingly, I must ask you now to desist from further inquiry long that general line.
>
> Mr. Lenske: May I except to the Court's remarks?

The Court: You may except.

Mr. Lenske: And note that exception. And also may I, if it please the Court, point out that I am trying to prove and want to prove the purpose of the Committee in examining the witness . . ."

On pages 77 and 78 we find the following cross-examination of Mr. Kunzig:

"Q. In determining on a proceeding with respect to obtaining information have the costs of obtaining information at any time been considered by the Committee?

Mr. Luckey: If the Court please, I fail to see the relevancy of that.

The Court: Wholly irrelevant. Sustained.

Mr. Lenske: Q. Mr. Kunzig, where conclusive information was readily available to the Committee at, let us say, a cost of six cents, and the same information could be obtained in another manner at a cost of $10,000—

The Court: Mr. Lenske, that matter is wholly irrelevant. Now, I have stated this several times. I want to be courteous and friendly about it, but I have repeatedly stated that this line of inquiry is irrelevant. Now you have your record on it, sir, and I think you should not persist in running counter to the ruling of the Court."

It must be borne in mind that Mr. Kunzig was ruled qualified by the Court as an expert relating to the Un-American Activities Committee of Congress. These questions were competent to test that expert witness. Further, they were relevant to ascertain the purpose of the Committee in its interrogation. If the Committee wanted to find out for information's sake the address, schooling, etc., of appellant and could do so with a letter of inquiry to the local FBI at the expenditure of only six cents, for airmail, that is one thing. But if it actually is not interested

in obtaining the information, but wishes to put on a witch-hunt show of information it already has, at a great expense, 2500 miles from Washington, D.C., that is another thing. In other words, whether the purpose of the Committee is interrogating appellant was for information for legislation could in some respects be ascertained by a forthright answer on the choice of a six cent method as against a $10,000 process.

It is the position of appellant that the Court should have admitted the testimony of Mr. Kunzig on these matters in view of the fact that it did admit his testimony as an expert relating to the Committee and Congressional matters pertaining to it.

SPECIFICATION OF ERROR No. 7

The Court erred in sustaining objections to questions addressed to the witness Joseph Santoiana.

ARGUMENT

Appellant called as a witness Joseph Santoiana, who was head of the FBI office in Portland. Following is his testimony:

> "By Mr. Lenske: Q. Mr. Santoiana, what is your occupation?
>
> A. I am Special Agent in Charge of the FBI office in Portland.
>
> Q. Were you such Special Agent on and prior to June 19th, 1954?
>
> A. I was prior to June, 1954.
>
> Q. For how long prior to June, 1954?
>
> Mr. Luckey: If the Court please, I would appre-

ciate some showing from Mr. Lenske of what he expects to prove by a witness from the Federal Bureau of Investigation concerning—

The Court: Yes, I recognize that there are some limitations. However, this particular question, I think, is not objectionable. How long were you?

A: I have been Agent in Charge of Portland since April 26th, 1954.

Mr. Lenske: Q. Prior to June 19th, 1954, did you as such Special Agent have any information regarding Herbert Simpson, the defendant in this case?

Mr. Luckey: If the Court please, I object to that.

The Court: Sustained.

Mr. Lenske: Q. Mr. Santoiana, did you on and prior to June 19th, 1954, consult with or were you consulted by any members or employees of the Velde Committee?

Mr. Luckey: If the Court please, I would object to that.

The Court: Sustained."

The rulings of the Court in sustaining the objections to the foregoing questions are consistent with the Court's ruling on the motion for a subpoena duces tecum and inspection of documents, etc., in the possession of the Committee. The Court denied the motion and ruled that even if the Committee had the information about appellant which was asked in the six questions, that would be irrelevant (Tr. of Proc. part 2, 3, 4).

Appellant tried to prove by the records of the Committee itself and through the testimony of the head of the FBI office in Portland that both agencies of the Government knew unqualifiedly the answers to each of the six questions that are involved in this case. The Court's

rulings in this respect were clearly in error and prevented appellant from producing an absolute defense to the charge against him. It must be borne in mind that the legitimate purpose of a congressional committee is to obtain information for legislation and not to prove a case. If the Committee knew through its own sources and through FBI sources, the answers to the questions involved, then it is obvious that the purpose of the Committee in interrogating appellant was not to obtain information for legislation and therefore was not pertinent.

Robert K. Carr, a professor of political science and a laywer made an exhaustive study and wrote a book entitled, The House Committee on Un-American Activities, and in it he said on page 458:

> "As long as the Committee exists the most reactionary forces in American life are sworn to seek to control it, and to use it as an instrument of witch-hunting and suppression."

SPECIFICATION OF ERROR No. 8

The Court erred in admitting testimony of the witness Robert L. Kunzig to which objections were made.

ARGUMENT

Appellant's counsel objected to any testimony being adduced by appellee on the ground of the insufficiency of the indictment under the law (Tr. of Proc. part 2 page 13). The indictment fails to state that the refusal of appellant to answer the questions was willful or wrongful or any equivalent thereof, or that appellant's refusal

to answer the questions was without just, proper or legal cause. In other words there was a complete void in an essential requirement of a valid indictment. Appellant will cite authorities on this point and cover it in greater detail later in this brief where the indictment is directly attacked.

On pages 15, 16 and 17 the Court permitted Mr. Kunzig to testify, over the objection of appellant's counsel, about the rules of the Committee and how the Committee was set up and what it was authorized to do, etc.

He was not identifying exhibits as such. He read from them and gave his own versions of the rules and the powers of the Committee. This was not only a violation of the best evidence rule, but permitted the jury to obtain a prejudicial concept that Mr. Kunzig spoke for the Congress or its Un-American Activities Committee and that what he said was the law.

Again on page 19 Mr. Kunzig testified over the objection of appellant's counsel as follows:

> "Q. Does the rule that you referred to require any particular number of persons to be on the subcommittee?
>
> Mr. Lenske: That is objected to as not the best evidence, your Honor.
>
> The Court: Overruled.
>
> A. Yes, sir. I personally was present when the rule was slightly amended and voted upon unanimously by the Committee to say that the Chairman would appoint subcommittees of three members of Congress, at least two of which had to be present. And at the hearings here in Portland there was a subcommittee of three appointed, of which two were present at all times."

How can an ordinary citizen defend himself against prejudicial testimony of this kind? If the Congress and its committees and subcommittees do not function under published rules and proceedings, but on the basis of hearsay oral testimony of one of its employees, then a private citizen has no chance, no matter how right he may be. The only competent testimony would have been a published rule of the Committee, duly certified and identified as such. The same is true of amendments to the rule and actions and appointments under such rule or amendment. The testimony adduced is wholly incompetent.

Therefore, the Government failed to adduce an integral portion of a necessary element in its prosecution and that alone was sufficient basis for allowance of appellant's motion to dismiss.

Again, the Court permitted Mr. Kunzig to testify over the objection of appellant's counsel (Tr. of Proc., part 2 page 20), what the purpose of the hearing at Portland was. Such testimony was not competent, was prejudicial and should not have been allowed.

Since all of the testimony adduced by the Government on the issue of pertinence was not competent testimony, the Government failed to make out even a prima facie case.

For the jury to have heard all of the incompetent testimony of Mr. Kunzig necessarily prejudiced the jury against appellant so that on the issues that the Court did confine to the jury appellant could not expect an unbiased verdict, but the error goes further than that. The Court's rulings and the Court's statements and the Court's

acceptance of the incompetent evidence led to error of the Court itself in its conclusion that the questions propounded to appellant were pertinent.

SPECIFICATION OF ERROR No. 9

The Court erred in all of the respects excepted to by appellant in relation to its charges to the jury.

The exceptions to the instructions of the Court appear on pages 132, 133 and 134 of the Transcript of Proceedings. The basic points raised by these exceptions are also set forth and raised in other specifications herein and therefore appellant does not feel it necessary to repeat under this exception the points otherwise covered.

SPECIFICATION OF ERROR No. 10

The Court erred in restricting the issues before the jury to the one of willful refusal to answer questions involved.

In other specifications appellant has pointed out that the question of pertinency and other issues were valid and substantial issues that should have been submitted to the jury if instructions favorable to appellant were not made upon them. Appellant will avoid repetition of the authorities and argument on this point.

SPECIFICATION OF ERROR No. 11

The Court erred in denying appellee's motion to dismiss the indictment.

ARGUMENT

A.

The indictment is insufficient in that it fails to state what is "the question under inquiry."

B.

The indictment states that appellant "was asked questions which were pertinent to the question under inquiry" but it does not state how or in what respect they were pertinent. In the absence of a statement of the question under inquiry the indictment does not and cannot state how and in what respect the questions asked of appellant are pertinent to the question under inquiry, but a showing of how and in what respect they are pertinent to the question under inquiry is a necessary ingredient of the indictment, particularly when the pertinence is not apparent on the face of the indictment. This is shown by the same line of reasoning as is found in U.S. v. John Reardon & Sons Co., 191 Fed. 454. In this case the Court states at page 456:

> "The fundamental rule, which never has been overthrown by the Supreme Court, although there are undoubtedly numerous expressions which seem to shake it, is that it is never sufficient to allege that an act is illegal, but you must allege something more which the Court can see on the face of the indictment is illegal if the facts are proven."

Further support for this position is found in Federal Practice Jurisdiction and Procedure, by William J. Hughes, Volume 9, on page 484:

"So all the material facts and circumstances embraced in the definition of the offense must be stated in the indictment, and the omission of any essential element cannot be supplied by intendment or implication."

Joyce on Indictments, Second Edition with Forms states on page 346:

"It is a general rule that mere legal conclusions should not be stated in an indictment as they neither add to nor detract from the indictment. And the want of necessary allegations in describing the offense cannot be supplied by averring conclusions of law."

The failure to state how and in what respect the questions asked of appellant were pertinent to the question under investigation cannot be excused on the ground that in the indictment the language of the charge is in the words of the statute. There is abundant authority on this:

Defending and Prosecuting Federal Criminal Cases, by Housel & Walser, Second Edition, page 343:

"Mr. Justice Gray, delivering the opinion of the Court, said: 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. U.S. v. Cruikshank, 92 U.S. 542; U.S. v. Simmons, 96 Ind. 360;

> Commonwealth v. Clifford, 8 Cush (Mass.) 215; Commonwealth v. Bean, 11 Id. 414; Commonwealth v. Bean, 14 Gray (Mass.) 52; Commonwealth v. Filburn, 119 Mass. 297'."

In Robertson v. U.S., 168 Fed. 2d 294, the Court states that an indictment in the language of the statute is ordinarily sufficient, but where the statute itself omits an essential element of offense or includes it only by implication, the indictment should allege it directly and with certainty.

C.

The indictment is fatally defective in that it fails to allege that the refusal of appellant was willful, or wrongful, or unlawful.

In Sinclair v. United States, 279 U.S. 263. 49 S. Ct. 268, 73 L. Ed. 692, the defendant was convicted of violating Sec. 102, the predecessor of Sec. 192, the statute under which the instant appellant was indicted and convicted. It must be noted, however, that the indictment in the Sinclair Case used this language:

> "And that said Harry F. Sinclair—*unlawfully* did refuse to answer said questions.—" (Our emphasis)

The Supreme Court held that it was not mandatory for the indictment to specify "willfully"—that "unlawfully refused to answer" was sufficient.

In United States v. O'Connor, 135 F. Supp. 590, the District Judge summarizes the decisions as follows at page 593:

> "From the time of the decision in Sinclair in which the conviction was affirmed and where the indictment

did not allege willfullness but did allege that the defendant 'then and there *unlawfully* did refuse to answer said question' down to and including the decision in Quinn, the records of this Court indicate that 47 cases have been tried in which the indictments charged violation of Section 192 or its forerunner Section 102. In all of those cases, the indictments conformed to the language in Sinclair which the indictment in the pending case follows without in any instance specifying that the refusal to answer was 'Willful'."

Conceding *arguendo* that an indictment is sufficient if it omits "willfully" and substitutes therefor "unlawfully," and conceding that 47 or more indictments so phrased have been sustained, we respectfully submit that the indictment in the instant case is fatally defective in that it pleaded neither "willfully," "unlawfully," nor even "wrongfully," nor any equivalent thereof. The indictment made no averment in any manner whatsoever that the appellant's failure to answer the questions was without just, proper, or legal cause.

D.

The nature of the questions propounded was such that the refusal to answer them could not form the basis for an indictable offense.

This raises the point that on the face of the indictment the questions asked were innocuous and inconsequential. In other words under normal circumstances no great and powerful government would imprison a person for refusing to answer such simple, ordinary and quite meaningless questions. That is the situation as the questions appear in the indictment. It is not alleged that there was anything

wrongful or unlawful in the failure to answer those innocuous questions. The indictment does not even use the word "unlawful." It fails to give any idea of what Congress was investigating or how such questions could possibly be pertinent, excepting only for the bare use of the word "pertinent." Therefore, these questions and any possible answers to them must necessarily be taken on the face of the indictment as inconsequential and the actual indictment and conviction on such indictment almost frivolous. However, the inocuity of these questions as they appear in the indictment should not be confused with the ominousness of these same questions in the police guarded, publicized, crowded and tense hearings before the Committee with charges of Communism by "friendly" witnesses and with dire admonitions from the Committee counsel or the representative of the Committee.

Therefore the indictment itself, as based upon the simple questions involved, did not state an offense under Section 192 but as will be pointed out under Specification of Error No. 23, those same questions in the atmosphere of the Committee hearing fully justified the exercise of privilege under the Fifth Amendment.

SPECIFICATION OF ERROR No. 12

The Court erred in denying appellant's motion for acquittal.

ARGUMENT

This error of the Court follows from the numerous errors under the various specifications herein and will also be covered in the summary.

SPECIFICATION OF ERROR No. 13

Appellant was substantially prejudiced and deprived of a fair trial by reason of the obvious prejudice and partiality of the jury.

ARGUMENT

It has been previously pointed out in this brief that objection was made by appellant to the jury panel and that appellant's counsel wished to put specific questions to the prospective jurors relating to their participation in the Wollam case on the preceding day as jurors therein. The Court overruled appellant's objection. Under the law, as cited and as a matter of fact, the jury must necessarily have been prejudiced against appellant in view of the conviction in the Wollam case and the participation of some of the jurors in both cases. The numerous adverse rulings of the Court against appellant, many of which were in error, had a prejudicial effect upon the jury. The inclusion of the hearsay and incompetent testimony of Mr. Kunzig before the jury must have had a detrimental effect on appellant's cause.

SPECIFICATION OF ERROR No. 14

The Court erred in failing to find that the question of pertinence was a question for the jury.

ARGUMENT

In presenting argument on this point, it is to be noted that the indictment is insufficient in its allegations on

the matter of pertinence. Had there been sufficient allegation in the indictment on that issue, appellant was entitled to a trial by jury thereon. This is guaranteed to appellant under the Sixth Amendment to the United States Constitution:

"Amendment VI.

Criminal proceedings—Speedy trial—Trial by jury—Venue of Action—Compulsory process.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . ."

There is no valid reason why the issue of pertinence should be considered an exception to the guarantee of a jury trial under this portion of the constitution. It is true that in some cases the courts have held that the questions at issue were pertinent as a matter of law and in other cases the courts have held that questions in those cases were not pertinent as a matter of law. In the instant case, if there was any doubt that doubt should have clearly been resolved against the government. But in any event, at the least, appellant was entitled to have that issue submitted to the jury.

SPECIFICATION OF ERROR No. 15

The Court erred in failing to instruct the jury that it could determine the issue of pertinence from both the evidence and from the jury's own knowledge and experience.

ARGUMENT

The issue of pertinence depends partly upon the purpose of Congress in the creation of the Committee and the purpose of the Committee when making its interrogation. One method of ascertaining that purpose is in the recorded resolutions of Congress and the Committee. If we are to go beyond these resolutions to ascertain the purpose, then the jury may be presumed to be just as competent to judge the issue as any expert, such as the former counsel for the Committee. There are some fields of law in which a jury is entitled to form its conclusions upon its own knowledge and experience and in which it may utterly disregard expert testimony. An illustration is the determination by a jury of the reasonable value of professional services. The writer submits that the issue of the purpose of Congress and the Committee and the pertinence of the questions asked in a Congressional investigation lends itself peculiarly and specially to such jury determination.

SPECIFICATION OF ERROR No. 17

The Court erred in holding that appellant did not rightfully invoke his privilege under the Fifth Amendment.

ARGUMENT

Since the trial of this cause, the U.S. Supreme Court has spoken in several cases on the exercise of the Fifth Amendment. Likewise, the Circuit Court of Appeals for

the Ninth Circuit has expressed itself in at least three cases. Following are the citations:

Quinn v. U.S., 75 S. Ct. 668, 349 U.S. 155;
Emspak v. U.S., 75 S. Ct., 687, 349 U.S. 190;
Bart v. U.S., 75 S. Ct. 712, 349 U.S. 291;
Jackins v. U.S., 231 F 2d 405;
Starkovich v. U.S., 231 F 2d 441;
Fagerhaugh v. U.S., Case No. 14,638, U.S. Court of Appeals for the Ninth Circuit decided April 24, 1956.

The atmosphere in this case did not differ materially from that in the other cases. Radio, television and newspaper coverage were there in full regalia. The "friendly" witnesses were there testifying about Communist membership, officership and activities of the witnesses, appellant amongst them, who concluded, upon advice of counsel that "discretion was the better part of valor." The hearings took place in a U.S. Federal Court Room, adequately flanked by uniformed policemen.

As to what happened and what was said and done at the hearing, Mr. Kunzig, the Committee counsel and interrogator, was a competent and able witness. Following is some of his testimony given at the trial (Tr. of Proc. part 2, pages 23, 24, 25).

"Mr. Kunzig: A. The Committee was interested, sir in seeing whether there were any subversive activities, for example, in connection with labor unions, in connection with education as such, and the Committee also had information, and has had information many times, that there is a pattern of Communism infiltrating industry, and we were interested in seeing whether that pattern was carried out in this area; also here in this Portland area. For these reasons the Committee came here and called witnesses who we believed had

information and whom we had been informed by confidential investigators and confidential informants that these particular witnesses had information that would assist the Congress and that they could give information upon which we could then go back and report to the full Congress, which would aid the Congress in passing appropriate legislation.

Mr. Carney: Q. I will ask you whether the Committee had before it any information of this character you just testified to regarding the Defendant Herbert Simpson.

A. Yes sir. The Committee was in possession of confidential information that Mr. Simpson had knowledge, extensive knowledge, of Communist activities in this area, and that if subpoenaed he would testify and answer the questions asked by the Congress, and that he could greatly assist the Congress in giving information about Communist activities in this area. We also were interested in hearing what Mr. Simpson had to say, because we had information that Mr. Simpson had been for some time in association with suspected Communists in this area; that he knew them, he knew their activities, he knew what they were doing, and that he could give that information to the United States Congress. In connection therewith we had information, confidential information, that Mr. Simpson was a member of the Communist party. That was borne out, that information, by sworn public testimony right in this building when we were here, where a Mr. Canon and—I have forgotten the name of the other witness—Mr. Owen—those two gentlemen both testified under oath that they knew or had information that the defendant here today, Mr. Simpson, had been a member of the Communist party and I believe, if I recall correctly, even on the State Central Committee of the Communist Party here in Oregon. For those reasons which we felt to be vitally important reasons the Committee of the Congress subpoenaed Mr. Simpson to appear before the Committee and to give us, we hoped, vital information on Communist Activities in this area."

Further Mr. Kunzig testified in response to questions by Mr. Carney on direct examination, quoting from the Transcript of Proceedings, part 2, pages 32, 33, 34, 35, and 36 as follows:

"Mr. Carney: Q. What was the purpose of the inquiry of Mr. Herbert Simpson as to his residence?

A. We asked that question, sir, as we always do, to fix the identity of the witness. It is very important for the Committee to know who the witness is that is sitting before it. We may think that we know, but as happened very recently in Washington before another Committee, just in the last few months, by the questions they brought out that the wrong man was sitting before the Committee. We always ask for identification purposes that question, sir.

Mr. Carney: Q. I will ask you what was the purpose of the inquiry as to whether Herbert Simpson had been in the Armed Forces of the United States?

A. Well, I am sure it is very clear that the Committee is interested, perhaps more than anything else, in the question as to whether there is any infiltration of Communism in our Armed Forces. That is of tremendous importance. So we asked Mr. Simpson as to whether he had ever been in the Armed Forces of the United States. *We had information that he had been a member of the Communist Party*, and since there was sworn testimony that he had been a member of the Communist Party, we wished to find out and inquire whether he was in the Armed Forces of the United States, perhaps while he was a member of the Communist Party, at any time. And he just refused to answer whether he had ever been in the Armed Forces of the United States."

SPECIFICATION OF ERROR No. 18

The Court erred in failure to provide opportunity for the appellant to present testimony and argument on the claim of privilege by appellant and the right to refuse to make the answers under the amendments to the Constitution other than the Fifth Amendment, as well as the Fifth Amendment.

ARGUMENT

The Court ruled that the issue of privilege was one for the Court to determine and was not to be submitted to the jury. At no time did the Court allot a time to appellant for the presentation of either testimony or argument, directed to the Court itself and without the presence of the jury, on the issue of privilege, i.e., until the time for arguing the motion for a new trial. This was on January 31, 1955. At that time counsel for appellant specifically asked the Court for the setting of such time so that appellant could present the testimony of witnesses to the Court alone on that issue (Tr. of Proc., part 3, page 38).

SPECIFICATION OF ERROR No. 19

The Court erred in refusing to permit evidence to be adduced of the purpose of the Congressional Committee in asking the questions in issue of appellant.

ARGUMENT

Appellant has already shown from the proceedings for the subpoena duces tecum and in attempting cross-

examination of Mr. Kunzig that the Court had the information requested in the six questions but the Court held that proof of such knowledge was immaterial. It is the position of appellant that such proof itself would show that the purpose of the Committee was not to obtain knowledge but to either persecute or prosecute appellant.

SPECIFICATION OF ERROR No. 20

The Court erred in ruling that knowledge by the appellee of the answers to each of the specific questions involved was in itself a defense or was competent evidence towards a defense of the indictment.

ARGUMENT

The Court frustrated every attempt of appellant to show that the Committee had conclusive knowledge of the answers to each of the six questions set forth in the indictment. A hearing before a Congressional Committee is not a trial of a lawsuit. If the Committee already had the information requested in the six questions and was satisfied with the information then its purpose in asking those same questions of appellant could not have been to obtain information for purposes of legislation. The purpose could have been, and in this instance was, to publicize by radio, television and newspapers, the information that the Committee had so as to bring animosity upon appellant and so as to cause him to lose his job. Again it should be noted that this is different from adducing cumulative evidence at a trial where such accumulation is proper. Here it was improper.

SPECIFICATION OF ERROR No. 21

The Court erred in denying appellant's motion to grant appellant up to February 15, 1955, within which to amplify, amend and supplement appellant's motion for a new trial on the ground of newly discovered evidence.

ARGUMENT

The case was tried on January 20, 1955, and a verdict rendered that day. The Rule grants only five days within which to file a motion for new trial. On that date appellant filed such motion. Appellant ordered a transcript of the testimony from the Court reporter but on the date the motion for new trial was held, January 31, 1955, the testimony had not as yet been transcribed by the reporter. As a part of appellant's motion for a new trial appellant requested up to February 15, 1955, within which to amplify, amend and supplement appellant's motion. The request was a reasonable one and it was an abuse of the Court's discretion to deny it.

SPECIFICATION OF ERROR No. 22

The indictment is so vague and indefinite in its allegations that it is insufficient to allege an indictable offense against the United States.

This point will be argued along with the succeeding one.

SPECIFICATION OF ERROR No. 23

The indictment shows on its face that no indictable offense was committed against the United States by appellant.

(a) The indictment fails to state the subject of inquiry or the subject of the Congressional investigation and it fails to show the pertinence of the questions involved.

(b) The indictment fails to negate the fact that appellant asserted the privilege accorded to him under the Fifth Amendment to the United States Constitution, which assertion was duly made for valid reasons in good faith on advice of counsel.

(c) The indictment fails to state that the refusal of appellant to answer the questions involved was without just, proper or legal cause.

(d) The inquisitors acting for said Committee knew the answers to the questions propounded and said Committee did not propound said questions to gather information for legislative purpose but for extraneous purposes beyond the jurisdiction of Congress and/or said Committee.

(e) The nature of the questions propounded were such that the refusal to answer them could not form the basis for an indictable offense.

(f) There is no allegation in the indictment that the refusal to answer was willful, wrongful or unlawful.

ARGUMENT

Authorities and argument have already been presented on these points and appellant will not repeat them except to cite the additional case of Blau v. United States, 340 U.S. 159 (1950).

SPECIFICATION OF ERROR No. 24

The Court erred in denying appellant's motion for a new trial.

ARGUMENT

The Court should have allowed appellant's motion for a judgment of acquittal or, in the alternative, for a new trial on the basis of the various specifications herein set forth, and appellant will not repeat them under this specification but will add the following point.

SUPPLEMENTAL POINT

The Committee did not meet the strict standard set forth in the Emspak case making it mandatory upon the Committee to clearly, unqualifiedly overrule the claim of privilege based upon the Fifth Amendment and specifically direct the witness to answer the specific question.

In the words of this Court in Fagerhaugh v. U.S., supra:

> "Since the conviction and sentence of appellant by the lower court, the Supreme Court of the United States in Quinn v. United States, 349 U.S. 155, 1955, and in two cases decided the same day, Emspak v. United States, 349 U.S. 190, 1955, Bart v. United States, 349 U.S. 219, 1955, has held that when a witness before a committee refuses to answer a question and adequately indicates to the committee that his refusal to answer is based upon the privilege against self-incrimination, then in order to lay a foundation for a prosecution the committee must "overrule" the claim of privilege based upon the Fifth Amendment and specifically direct the witness to answer the question."

These requirements were not met in the instant case.

Appellant's testimony before the Committee appears in Exhibit 5.

It will be noted that in no instance did the Committee "overrule" the claim of privilege. It did direct an answer after the claim was first asserted. But in each instance, that direction was met with a restatement of the refusal and a reassertion of the privilege. There was never any statement by the Committee that the assertion or reassertion of the claim of privilege was "overruled." To use the language of the Court in Quinn v. U.S.:

> "Petitioner was never confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt."

In fact, the Committee Chairman, despite the request of its counsel to do so, refused to warn the appellant of contempt. This occurred following the question of whether appellant had ever attended high school. There was one suggestion by the Committee Chairman to appellant that he was placing himself "in a very good place for contempt action . . .", but this was not directed to a refusal to answer. It was directed to appellant's statement, "I would submit that my counsel is not able to cross examine any of the witnesses."

SUMMARY

There is one item in the record that distresses appellant's counsel and may give the Court ground to ignore all of the testimony of Robert L. Kunzig, the sole witness for the Government. Mr. Kunzig testified of his extensive

academic education, law education, experience as an advocate-general in the army, experience as a war crimes prosecutor after the war and his experience in handling hundreds and hundreds of cases as counsel for the Un-American Activities Committee (Tr. of Proc. part 2, page 61, 62). Yet we find in the record (Tr. of Proc. part 2, page 57), the following astounding admission on cross-examination:

> "Q. In Washington, D.C., is there a library that has the City Directory of Portland, Oregon, and the telephone books of Portland, Oregon?
> A. I don't know."

It is submitted that for want of any explanation or justification in the record for such colossal ignorance or evasion by the highly educated and experienced counsel for the Committee and the Government's sole witness, all of the testimony should be ignored and the case dismissed for want of a prima facie case.

It may be interesting to note that the Court's erroneous views of some of the important matters in this case were evident at the very beginning of the hearing. Before the opening statements were made and any testimony at all was adduced, the Court had formed its conclusion on the issue of pertinence and other important issues. It stated (Tr. of Proc., part 2, page 3):

> "My view of that is that whether or no the Committee had or had not any information of any value on those subjects is wholly immaterial. My view is that the Congressional Committee had the right to ask these questions to identify the witness, if nothing else, and to confirm any previous data they might have had. The questions referred to, in my judgment, were clearly pertinent questions, and even if the Con-

gressional Committee had had the whole detail about it in its possession, it would be wholly immaterial as far as this trial is concerned, because the Congressional Committee would have the right to make a sworn record of the information as distinguished from whatever other form they might have that data in."

There were numerous other errors committed by the Trial Court with which this brief does not deal in detail and the Appellate Court may well ask, how is it that so many errors were committed by such an able trial judge in such a small (one day, misdemeanor) case? Part of the answer is in the fact that not all the appellate law had been made on the issues in this case at the time this trial took place. Another part of the answer is in the inherent limitations of man. When the alleged Communist affiliations of appellant was touched upon during the trial the Court was quick in its effort to try to safeguard the rights of appellant by admonishing the jury: "In fairness to all concerned, the questions that are part of the indictment in this case are not concerned with these matters that we are not dealing with. I hope you will all keep that in mind" (Tr. of Proc., part 2, page 87). But the Court was unable to free itself from the hysteria and prejudice of the time, as appellant will shortly point out. The Court's generosity is apparent in that it allowed appellant to be out on bail although ". . . frankly it is very difficult for me to honestly say that I have any concern that there is any substantial question to be presented on appeal in these cases" (Tr. of Proc., part 3, page 69). Yet the Court could not free itself from the very tendency that it admonished the jury to guard against.

After the simple, frank and harmless statement of appellant (Tr. of Proc., part 3, pages 55 to 59), giving the Court all the answers to the six questions he had refused to give to the Committee and extolling the Roosevelt new deal era, the Court, in imposing sentence, said (Tr. of Proc., part 3, page 60), ". . . so I suggest to you, in response to your statement to me, that you give some thought about whether or not Communism is any better than Fascism." The Court further said (Tr. of Proc., part 3, page 62), ". . . this Government that you condemned or condemn . . ." The record is clear that appellant made no statement that could call forth such remarks leading to imposition of sentence. Thus the Court's sentence of imprisonment for ten months, compared to 30 days in the Fagerhaugh case, was apparently based partly upon something for which appellant was not convicted and for charges against the Government that he did not make.

In holding as a matter of law that appellant did not have the right to refuse to answer the questions on the ground of privilege the Court failed to apply the principle of law it correctly gave to the jury in the following instruction (Tr. of Proc., part 2, page 123):

> "Of course, one of the matters to be considered is the matter of the identity of the defendant. Of course, the Government has the burden of proving that the defendant is the same person who appeared before the Committee and who refused to answer as charged, and that must be proven beyond a reasonable doubt just as any other fact in the case."

The six questions asked of appellant at the Committee hearing were identifying questions and answers given could be used as the sole testimony to prove identification.

The record (Tr. of Proc., part 2, page 85), bears this out:

> "Mr. Lenske: Q. Now, after you inquired the name, would you make an inquiry as to identifying questions further about the individual?
>
> Mr. Kunzig: A. Always: as I have explained earlier today, the Committee desires to have clear identification of the person; where he lives, where he works, his education, and so forth and so on . . .
>
> Q. Those are asked as identifying questions?
>
> A. That is certainly one of the major purposes . . .
>
> Q. Does that mean that there might be another Herbert Simpson in Philadelphia who was a different person, and your purpose is to identify this person through these means as that particular Communist and not another person?
>
> A. Let me answer that this way; that many is the time—to use the name Herbert Simpson taken hypothetically—many is the time there turns out to be five Herbert Simpsons in Portland, and we get telephone calls from the other four say, 'Wait a minute. I am not the one that is in the Communist Party.' . . ."

Appellant has already shown in this brief that the Committee claimed appellant was a Communist; certainly neither the Committee nor the Court had the right to deny appellant the privilege granted him by the Fifth Amendment to remain silent on any information essential to a prosecution against him. See Bowers v. U.S. 202 F 2d 447.

In most cases the right to exercise privilege was liberally construed in favor of the witnesses. In the notable exception of Rogers vs. U.S., 340 U.S. 378, Justice Black, in his dissenting opinion concurred in by Justices Frankfurter and Douglas, says on page 378:

> ". . . today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment

> for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."

Following the strict construction of the Rogers case, appellant claimed the right promptly. Since the majority of the Court has readopted the liberal construction giving the witness the benefit of the doubt in the Emspak and Quinn cases, appellant's right to exercise the privilege should now be clear and conclusive. See also Hoffman v. U.S., 341 U.S. 479.

In a case arising in appellant's district the trial judge admonishes witnesses that they must claim the privilege promptly when he states in U.S. v. Johnson, 76 F. Supp. 538 on pp. 540-1.

> "The privilege against self-incrimination is neither accorded to the passive resistant, nor the person who is ignorant of his rights, nor to one indifferent thereto. It is a fighting clause . . . Once he testifies as to part, he has waived his right . . ."

For emphasis appellant calls to the Court's attention once more the fact that the six questions are innocent and innocuous and form no basis for an indictment as they appear on the indictment issued against appellant in this case. Therefore the indictment should have been dismissed. On the other hand, however, those same questions asked in the atmosphere of the Committee hearing and in view of the testimony of previous witnesses against him, placed appellant on dangerous ground so as to fully

justify his exercise of the privilege under the Fifth Amendment.

Dated, Portland, Oregon

August 17, 1956

Respectfully submitted,

REUBEN G. LENSKE,
Attorney for Appellant.